

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 18, 2007 Session

STATE OF TENNESSEE v. KENNETH BRYAN HARRIS

**Direct Appeal from the Criminal Court for Wilson County
No. 96-0710 John D. Wootten, Jr., Judge**

No. M2006-01093-CCA-R3-CD - Filed November 5, 2007

This is a State appeal of the trial court's dismissal of an indictment on the basis of a speedy trial violation. After review, we affirm the dismissal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; and Scott R. McMurtry, Assistant District Attorney General, for the appellant, State of Tennessee.

G. Frank Lannom, Lebanon, Tennessee, for the appellee, Kenneth Bryan Harris.

OPINION

The defendant was originally indicted for aggravated assault by a Wilson County Grand Jury on March 18, 1996. The indictment stemmed from an alleged shooting of James Ray Foutch on January 21, 1996. The District Attorney General was, at the time of the indictment, prosecuting Foutch for an alleged aggravated assault on the defendant. Consequently, a District Attorney General Pro Tempore was appointed to prosecute the defendant. After the defendant filed an Application for Pre-Trial Diversion, the State resubmitted the defendant's case to the grand jury and obtained an indictment for two counts of attempted first degree murder and aggravated assault. Subsequently, the trial court denied the State's motion to enter a nolle prosequi of the original indictment, dismissed the second indictment, and granted the defendant's Pre-Trial Diversion Application. These actions were reversed by State v. Harris, 33 S.W.3d 767 (Tenn. 2000), and the case was remanded for trial on the superseding indictment.

After remand, a second pro tempore prosecutor was appointed due to the first having left the state. The second prosecutor's first court appearance concerning this case was on April 19, 2004. The defendant filed a Motion to Dismiss the indictment on August 11, 2004. The Motion to Dismiss included multiple grounds, one of which was a violation of the defendant's right to a speedy trial.

Upon hearing the Motion to Dismiss, the trial judge dismissed the indictment pending against the defendant for violation of his right to a speedy trial, pursuant to the United States' and Tennessee's Constitutions, Tennessee Code Annotated section 40-14-101, and Rule 48(b) of the Tennessee Rules of Criminal Procedure. The State now appeals the Order of Dismissal.

Appellate review of the dismissal of an indictment by a trial court is based on an abuse of discretion standard. Harris, 33 S.W.3d at 769. An abuse of discretion may be shown when the trial court applied an incorrect legal standard or reached a decision against logic or reasoning which caused an injustice to the complaining party. State v. Stevens, 78 S.W.3d 817, 832 (Tenn. 2002).

The trial court herein dismissed the indictment in this cause due to a violation of the defendant's speedy trial rights pursuant to the Constitutions of both the United States and the State of Tennessee, Rule 48(b) of Tennessee Rules of Criminal Procedure, and Tennessee Code Annotated section 40-14-101. The point of our review is to determine if the trial court abused its discretion by the dismissal.

The United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972), formulated a balancing test to determine whether a defendant's right to a speedy trial had been violated under the Sixth Amendment. The balancing test was adopted by the Tennessee Supreme Court in State v. Bishop, 493 S.W.2d 81, 83-85 (Tenn. 1973). The balancing test consists of consideration of four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice resulting to the defendant from the delay. Id. at 84.

The defendant was originally indicted on March 18, 1996. However, the trial court based its finding of unreasonable delay on the period after the case was remanded by our Supreme Court on December 13, 2000, until April 2004, when the second prosecutor pro tem entered his appearance. A delay of one year triggers a presumption that delay has prejudiced the defendant, and the presumptive prejudice intensifies over time. State v. Utley, 956 S.W.2d 489, 494 (Tenn. 1997). For purposes of our analysis, the trial court's finding of a delay in excess of three years clearly triggers further balancing of the remaining factors as established in Barker. It should also be noted that this case was originally initiated on March 18, 1996. The entire delay is not attributable to the State; however, the passage of time cannot be ignored in considering actual prejudice to the defendant.

The next factor for consideration is the reason for delay. The second prosecutor pro tem, in arguing against the motion to dismiss, characterized the reason for delay as "bureaucratic neglect" and "indifference." The trial court specifically found there had been "neglect" and "bureaucratic delay." Our Supreme Court set forth four general categories of reasons for delay: (1) intentional

delay to gain tactical advantage or harass the defendant; (2) bureaucratic indifference or negligence; (3) delay necessary to the fair and effective prosecution of the case; and (4) delay caused or acquiesced in by the defense. State v. Wood, 924 S.W.2d 342, 346-47 (Tenn. 1996). Delay caused by negligence is less heavily weighed against the State than intentional delay. Id. at 347. However, the weight assigned to negligent delay will increase as does the length of the delay. See State v. Simmons, 54 S.W.3d 755, 760 (Tenn. 2001). “And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness[.]” Doggett v. United States, 505 U.S. 647, 657, 112 S. Ct. 2686, 2693 (1992). In this instance, a delay in excess of three years from this case’s remand must exact a substantial weight against the State.

The third factor in the balancing test is whether the defendant has asserted his right to a speedy trial. Barker, 407 U.S. at 531, 92 S. Ct. at 2192; Bishop, 493 S.W.2d at 83-84. The record reflects that the defendant first asserted his right by his Motion to Dismiss filed August 11, 2004. The State contends that the Motion to Dismiss, though based on speedy trial grounds, was not a formal demand. The trial court found that the demand was implicit in the Motion. The State further argues that the lack of any formal demand previously shall weigh heavily against the defendant. Although the defendant was arguably late in his assertion, this is only one factor and does not, standing alone, preclude dismissal of prosecution when the delay is lengthy. State v. Jefferson, 938 S.W.2d 1, 13 (Tenn. Crim. App. 1996). The burden of protecting the right to a speedy trial is not placed solely on the defendant. In fact, a defendant has no duty to bring himself to trial. Barker, 407 U.S. at 527, 92 S. Ct. at 2190. In light of these authorities, we will not adopt a position that disqualifies a defendant from an existing right solely because it was not asserted earlier in the proceeding.

The fourth Barker factor concerns the prejudice from the delay. This factor was designed to protect three interests of the defendant: (1) prevent oppressive pretrial incarceration; (2) minimize the defendant’s anxiety and concern; and (3) limit the possibility of impairment to preparation of the defense. Barker, 407 U.S. at 532, 92 S. Ct. at 2193.

In this case, the defendant was not incarcerated. The defendant did demonstrate to the trial court’s satisfaction that he suffered emotionally during the long period since the original charges in 1996. Terry Ashe, the Sheriff of Wilson County since 1982, had known the defendant for many years. He stated that he had observed the defendant deteriorate emotionally as a result of the long pendency of these charges. The trial court specifically accredited Sheriff Ashe’s testimony in this regard and foreclosed further testimony on the subject as cumulative.

The third prong of the prejudice inquiry, impairment to the preparation of a defense, is not limited to the specifically demonstratable, and affirmative proof of particularized prejudice is not essential to every speedy trial claim. Doggett, 505 U.S. at 655, 112 S. Ct. at 2692. It was recognized in Barker that impairment of the defense is the most difficult prejudice to prove because time’s erosion of exculpatory evidence and testimony can rarely be shown. 407 U.S. at 532, 92 S. Ct. at

2193. Nevertheless, the defendant was, in this case, able to prove prejudice due to the loss of files, witnesses, and possible exculpatory evidence.

During the defendant's Motion to Dismiss hearing, the defendant established a history of a strained relationship between the defendant and the victim, Foutch. The victim held a delusional belief that he exercised control over Cedar Forest Park near where he or his family had previously owned property. Foutch perceived that the defendant was in violation of some regulations concerning the park. On April 14, 1995, Foutch had gone to the defendant's residence and held a loaded revolver under the defendant's chin. Foutch was indicted and ultimately pled guilty to reckless endangerment. This prosecution was the cause for a prosecutor pro tem's appointment to prosecute the defendant for the incident that occurred January 21, 1996, in which the defendant allegedly shot Foutch.

The file of the original prosecutor pro tem in State v. Harris could not be found, and the current prosecutor essentially had no file other than the appellate record and items that the defense had provided. Also, there was no District Attorney file to be found in State v. Foutch. The case had been expunged, and the court file was apparently destroyed. The defendant had earlier obtained, in discovery, a copy of a psychological evaluation of Foutch conducted by Dr. Gary D. Proctor. The report was only partial in that portions had been blacked out. It did reveal that Dr. Proctor had found that Foutch suffered from delusional and persecution-type disorders but was not insane. In the interim, Dr. Proctor had moved from Wilson County ostensibly to Florida. Efforts by defense counsel to find Dr. Proctor had been in vain.

David Kennedy was the investigator for the Wilson County Sheriff's office in 1996. He interviewed Foutch after the alleged shooting and also made a detailed sketch of the crime scene. Kennedy's sketch could not be found in the sheriff's file or any other source. Kennedy did remember that Foutch's version of the incident conflicted with the actual evidence found on the scene and contained in the sketch.

The defendant established that he would be deprived at trial of certain known evidence of exculpatory value. The loss of the prosecutor's files in both State v. Harris and State v. Foutch foreclose the discovery of evidence that could also prove exculpatory. The defendant in this case, in addition to benefitting from presumptive prejudice, has also demonstrated actual prejudice resulting from the delay.

Conclusion

We conclude that the trial court did not abuse its discretion by its dismissal of the indictment as its findings were faithful to logic and authority. As stated in Doggett, the State "can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it." 505 U.S. at 657, 112 S. Ct. at 2693-94.

In applying the Barker balancing test, the trial court found the delay attributable to the State to be in excess of three years. This represents three times the triggering period for speedy trial review. The trial court charitably found that it was due to simple neglect or bureaucratic delay. In light of the elapsed time since the original indictment, it could be viewed as extreme neglect. The defendant's failure to make a formal speedy trial demand serves to weaken the defendant's position to some degree. However, it is but one factor to be considered with the remaining considerations. In all other respects, the balancing test supported dismissal. The defendant not only enjoyed the benefit of presumptive prejudice but was able to show actual prejudice through the loss of exculpatory evidence. In this case, the lapse of time not only eroded memories but also physical documents. We conclude that the dismissal of the indictment was warranted and well within the discretion of the trial court. Accordingly, the ruling is affirmed.

JOHN EVERETT WILLIAMS, JUDGE